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July 19, 2017

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Tax

RULE: 110CSR28, Amendment, Municipal Sales and Service and Use Tax

DATE FILED AS AN EMERGENCY RULE: June 13, 2017

DECISION NO. 2-17

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

A handwritten signature in cursive script that reads "Mac Warner".

Mac Warner  
Secretary of State

EMERGENCY RULE DECISION  
(ERD 2-17)

AGENCY: Tax  
RULE: Municipal Sales and Services and Use Tax Administration  
FILED AS AN EMERGENCY RULE: June 13, 2017

- par. 1 Tax has filed the above amendment to an existing rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 Tax filed this emergency rule with supporting documents with the Secretary of State and with LRMRC June 13, 2017.
- par. 7 It is the determination of the Secretary of State that Tax has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Code §11-10-11C reads:

***§11-10-11c. State administration of local sales and use taxes and excise taxes; jurisdiction and standing before the office of tax appeals; rule-making authority.***

***(a) The Tax Commissioner has exclusive responsibility for administering, collecting and enforcing all local sales and use taxes and excise taxes imposed pursuant to article twenty-two, chapter seven of this code, section five-a, article one, chapter eight of this code, article thirteen-c, chapter eight of this code and article thirty-eight, chapter eight of this code.***

***(b) Pursuant to, and limited by, the provisions of section eight, article ten-a of this chapter, the Office of Tax Appeals has exclusive and original jurisdiction to hear disputes arising***

*from any local sales and use taxes and excise taxes for which the Tax Commissioner has exclusive administration, enforcement and collection responsibility. No municipality or county has standing before the Office of Tax Appeals in any dispute arising under any local sales and use tax and excise tax upon which the Tax Commissioner has exclusive responsibility for administration, enforcement and collection.*

*©) Notwithstanding any other provision of this code to the contrary, the Tax Commissioner may assess a fee, to be established by legislative rule pursuant to the provisions of article three, chapter twenty nine-a of this code, to be retained from collections authorized by section five-a, article one, chapter eight of this code, and section six, article thirteen-c, chapter eight of this code: Provided, That the fee may not exceed five percent of such collections in total including any fee otherwise authorized by this code or any duly enacted ordinance.*

*(d) Establishment of special revenue account.*

*(1) There is created in the State Treasury a special revenue revolving fund account known as the "Local Sales Tax and Excise Tax Administration Fund". Expenditures from the fund shall be for the purposes set forth in this section and are not authorized from collections but are to be made only in accordance with appropriation by the Legislature and in accordance with the provisions of article three, chapter twelve of this code: Provided, That for the fiscal year ending June 30, 2014, expenditures are authorized from collections rather than pursuant to appropriation by the Legislature. The fund shall consist of:*

*(A) Any funds collected pursuant to section ©) of this section; and*

*(B) Any funds received on and after July 1, 2013, from fees retained by the Tax Commissioner pursuant to section six, article thirteen-c, chapter eight of this code; and*

*©) Amounts deducted and retained by the Tax Commissioner under subsection (e), section eleven-a of this article; and*

*(D) Any future funds appropriated by the Legislature or transferred by any public agency as contemplated or permitted by applicable federal or state law; and*

*(E) Any accrued interest or other return on the moneys in the fund.*

*(2) On July 1, 2013, all moneys in the Tax Department "Municipal Sales and Use Tax Operations Fund" established under section six, article thirteen-c, chapter eight of this code shall be transferred to the Local Sales Tax and Excise Tax Administration Fund established in this section.*

*(3) On July 1, 2013, all moneys in the "Special District Excise Tax Administration Fund" established under section eleven-b of this article shall be transferred to the Local Sales Tax and Excise Tax Administration Fund established in this section.*

*(4) Amounts deposited in the Local Sales Tax and Excise Tax Administration Fund may be expended by the Tax Commissioner for the general administration, collection and enforcement of all local sales and use taxes and excise taxes imposed pursuant to article twenty-two, chapter seven of this code, section five-a, article one, chapter eight of this code, article thirteen-c, chapter eight of this code and article thirty-eight, chapter eight of this code.*

*(e) Notwithstanding the provisions of section eleven-b of this article, The Tax Commissioner may prescribe by rule the schedule and manner for deposits of moneys into the Local Sales Tax and Excise Tax Administration Fund and any other administrative*

*and procedural requirements as may be useful or necessary for the management and handling of the fund.*

*(f) Effective Date - The provisions of this section enacted in 2013 are effective on and after July 1, 2013.*

par. 9 It is the determination of the Secretary of State that the has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 ©) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

*(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.*

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by Tax are as follows:

Out of an abundance of caution, the City of Weston prepared its budget for FY 2018 without inclusion of the municipal consumers sales and use tax revenues. The city was unsure of the potential revenue yields that could be expected from the tax, and so set its budget conservatively. Notwithstanding budget formalities, municipal consumers sales and use tax revenues were anticipated on the assumption that revenue from a one percent municipal sales and use tax would be generated beginning July 1, 2017.

However, Weston did not adopt its municipal sales and use tax ordinance until March 16, 2017, and the existing legislative rule requires that a certified copy of the adopted ordinance must be provided to the Tax Commissioner at least 180 days before July 1, 2017. The current legislative rule (Title 110, Series 28) also provides that a new municipal sales and use tax ordinance, and any change in rates of an existing municipal sales and use tax ordinance, may only take effect on the first day of July that begins at least 180 days after a certified copy of the adopted ordinance imposing a new municipal sales and use tax, or the ordinance amending an existing municipal sales and use tax ordinance, is provided to the Tax Commissioner. It has also been determined that as of March 16, 2017, the City of Weston had not amended its business and occupation tax ordinance to reduce its business and occupation tax, which reduction is required by W. Va. Code § 8-1-5a in order to impose a municipal sales and use tax. It is anticipated that this ordinance will be adopted by the City Council of Weston with an effective date of January 1, 2018. The Tax Commissioner determined that because the City of Weston had not complied with the 180-day rule in CSR § 110-28-8, the Tax Commissioner would not

begin to collect the City's municipal sales and use tax until July 1, 2018. For the City of Weston and its residents, lack of access to the tax revenue anticipated by the municipal sales and use tax will inflict substantial harm to the public interest, negatively affecting all services provided by the municipality, including police protection, firefighting, public health and infrastructure maintenance. Accordingly, pursuant to W. Va. Code § 29A-3-15(f), the need for this rule qualifies as an emergency.

'Under the emergency rule, language is added to CSR §110-28-8.1 that allows a municipal sales and use tax to take effect, and be collected by the Tax Commissioner, either on the July 1st or the January 1st that begins at least 180 days after a certified copy of the ordinance imposing the tax is submitted to the Tax Commissioner. This emergency amendment would allow the City of Weston's municipal sales and use taxes to go into effect and be collected beginning January 1, 2018, assuming the ordinance to reduce the City of Weston's business and occupation tax is effective January 1, 2018.

Weston is under significant financial strain due to downturns in the economy and the paucity of resources available to the city. Although the change to be adopted by the emergency rule is a benign adjustment allowing for two possible start dates annually, that change is crucial to the City of Weston.

The State Tax Department has submitted to the Governor for initial approval a proposed permanent amendment to Title 110, Series 28, Section 8, Code of State Rules, pursuant to which a municipality that imposes a municipal consumers sales and use tax, and any municipality that changes the rate of a municipal consumers sales and use tax, shall notify the Tax Commissioner at least 180 days before the date the municipal consumers sales and use tax takes effect or the change in the rate of the tax takes effect and the effective date may be either January 1 or July 1.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . ."immediate preservation of public peace, health, safety or welfare"

par. 14 This decision shall be cited as Emergency Rule Decision 2-17 or ERD 2-17 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with Tax.

*Mac Warner*

Mac Warner  
Secretary of State

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